No. 20567

United States
COURT OF APPEALS
for the Ninth Circuit

ALONZO W. DERING,

Appellant,

v.

EVERETTE H. WILLIAMS, Trustee in Bankruptcy of Eldon P. Dering, bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE WILLIAM T. BEEKS, Judge

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JURISDICTIONAL STATEMENT

This action was commenced in the United States District Court for the District of Oregon by appellee-trustee in bankruptcy for Eldon P. Dering, a bankrupt, to recover moneys claimed to be due appellee from appellant-defendant, by reason of transactions between appellant and bankrupt involving certain shares of capital stock of Dering Industries, Inc., an Oregon corporation, orig-

inally owned by bankrupt (R. 1-6). The appellee based his alleged cause of action upon Sec. 67 (d) (2) of the Bankruptcy Act (11 U.S.C. 107 (d) (2). Jurisdiction existed by reason of Section 67(e) of the Bankruptcy Act (11 U.S.C.A. 107 (e).)

This appeal is from a judgment entered, after trial, in favor of appellee (R. 90) based upon Findings of Fact and Conclusions of Law (R. 87-90) which were entered over objections of appellant (R. 59-67, 83-86).

The designated record in this Court includes the entire record in the district court, including Notice of Appeal, Undertaking and other documents necessary to perfect this appeal (R. 96-7).

STATEMENT OF FACTS

Dering Industries, Inc., an Oregon corporation, was organized in 1951 with 200 shares of capital stock. Eldon P. Dering, the bankrupt herein, and Alonzo T. Dering, appellant-defendant were the only original stockholders, each owning 100 shares. The bankrupt and appellant were officers and directors of the corporation during the entire period involved.

At the time of the organization of the corporation, (September 30, 1951) Eldon P. Dering, the bankrupt, for a good and valuable consideration, executed and delivered to appellant, Alonzo T. Dering, an option giving appellant the right to purchase any stock in Dering Industries, Inc., which the bankrupt might own "at a price per share based on the cost price of the inventory

and book assets of the corporation as shown by its records less current indebtedness" in the event the bankrupt became "bankrupt or insolvent." The Pre-Trial Order includes an admission of the execution of this option as well as the consideration therefor (R. 28 L. 14 to R. 30 L. 10).

Dering Industries, Inc. acquired a franchise or license to manufacture metal gates. At the time of the hereinafter mentioned transactions, the licensor was Life-Time Gate Company, a subsidiary of Moncreif-Lenoir of Houston, Texas (Tr. 5-6). This franchise or license was transferable only with the consent of the licensor (Ex. 29, Tr. 64).

According to the admitted facts contained in the Pre-Trial Order, the corporation continued operation without any change in the stock ownership until on or about December 6, 1961, when appellant paid the bankrupt the sum of $10,000.00 in return for which the bankrupt endorsed and delivered to appellant the stock certificate covering the 100 shares of capital stock in Dering Industries, Inc., theretofore owned by him (R. 30 Pre-Trial Order Para. IV). Simultaneously appellant executed and delivered to the bankrupt an option to purchase stock wherein appellant granted the bankrupt the exclusive right to purchase 100 shares of the capital stock of Dering Industries, Inc., for a period of 180 days for $10,000.00, together with interest at the rate of 6% per annum from date until the exercise of such option (R. 30-31).

On or about the 6th day of June, 1962, the bankrupt

paid appellant the sum of $3,000.00 and the appellant executed and delivered to the bankrupt a similar option to purchase stock, except that it covered only 70 shares of the capital stock of Dering Industries, Inc. (R. 31-32).

On or about the 6th day of December, 1962, the bankrupt paid appellant the sum of $3,000.00. Appellant applied some of the money to interest under the terms of the option. Appellant executed and delivered to the bankrupt a similar option except that it covered only 48 shares of the capital stock of Dering Industries, Inc. (R. 32).

Thereafter, on or about the 20th day of February, 1963, appellant paid the bankrupt the sum of $5,850.00; the stock certificate originally issued to the bankrupt, covering 100 shares of Dering Industries, Inc., which had been endorsed and delivered to appellant on December 6, 1961, was cancelled and the corporation issued certificates representing these shares to appellant (R. 34). At the same time, appellant executed and delivered to the bankrupt an option covering the right to purchase 100 shares of such stock (R. 32-34).

Compensation of the bankrupt and appellant, for services rendered to Dering Industries, Inc. was fixed on an annual basis. For the year ending June 30, 1963, the bankrupt received $3,000 compensation; subsequent to that time, his compensation was $600.00 per year (Tr. 77); the minutes of a meeting of stockholders of the corporation, signed by the bankrupt as secretary, dated September 25, 1963 (Ex. 41) recite:

> "all the stock of Dering Industries, Inc., is now owned by Alonzo W. Dering as Eldon P. Dering sold his shares during the year, Eldon P. Dering has an option to purchase the number of shares in Dering Industries, Inc., that were sold."

Appellant had knowledge of the insolvency of the bankrupt from and after November 1, 1963 (R. 37).

On March 3, 1964, appellant wrote a letter to W. F. Lenoir, Jr., of Life-Time Gate Co., indicating his desire to sell the capital stock of Dering Industries, Inc., and requesting an offer (Ex. 22).

On March 4, 1964, the last option was executed by the bankrupt and appellant (R. 34-35).

On March 10, 1964, appellant received a letter from Life-Time Gate Co., indicating that they were not interested in purchasing the corporate stock (Ex. 24).

Appellant commenced negotiations with Western Fence & Wire Works, Inc., an Oregon concern, and that company (Ex. 27) as well as the appellant wrote to Life-Time Gate Co. (Ex. 28). The testimony was conflicting as to the amount of the proposed purchase price, if a sale were to be made to Western Fence. Appellant testified that the price was to be $10,000.00 for the franchise or license, plus the value of the other assets (Tr. 29). Mr. Galton, a representative of Western Fence, testified that his recollection of the prices mentioned was different than the appellant's recollection (Tr. 90, 92, 96, 97).

Life-Time Gate Co. refused to consent to a transfer

of the franchise to Western Fence (Ex. 29). Life-Time Gate Co. did not know the price discussed in the negotiations of appellant with Western Fence (Tr. 30), and offered orally to pay $25,000.00 for the franchise, plus the value of the other assets. This oral offer was confirmed by letter under date of March 27, 1964 (Ex. 29). This agreement was wholly executory (Tr. 27). The amount agreed to be paid for the franchise was more than appellant had asked of Western Fence, but apparently was fixed by previous negotiations (Tr. 64, 65).

The bankrupt filed his petition in voluntary bankruptcy in the District Court of the United States of America for the District of Oregon on April 16, 1964 (Ex. 1), and was adjudicated as such.

The Statement of Affairs filed by the bankrupt with his petitions and schedules, in such bankruptcy (Ex. 1) included the following:

"11. Transfer of Property

a. What property have you transferred or disposed of, other than in the ordinary course of business, during the year immediately preceding the filing of the original petition herein?

Released option to purchase stock in Dering Industries, Inc., to brother Alonzo Dering on 3/4/64"

Appellant was not listed as a creditor in the schedules filed in the bankruptcy proceeding (Ex. 1).

On or about June 30, 1964, the executory contract between the appellant and Life-Time Gate Co. was performed, by the transfer of the 200 shares of capital stock

of Dering Industries, Inc. to the purchaser and payment to appellant of the sum of $50,240.00.

On June 30, 1964, a letter on behalf of appellant was addressed to the bankrupt, with copies to the Referee in Bankruptcy before whom the matter was pending, and the attorney for the trustee, stating that if the bankrupt or trustee claimed any interest in the capital stock of Dering Industries, Inc., appellant desired to exercise the option of September 30, 1951 (Ex. 36). The book value of 100 shares of the capital stock of Dering Industries, Inc., as of May 31, 1963, was $12,494.00 (Ex. 33). The book value of 100 shares as of June 30, 1964, was $12,620.74 (Ex. 34). The franchise was not carried upon the books as an asset (Ex. 33).

On or about December 1, 1964, the appellee commenced this action against appellant, seeking to recover one-half of the price received by the appellant for the sale of the capital stock of Dering Industries, Inc., less $10,600.00, relying upon Sections 67 (d) (2) and (e) of the Bankruptcy Act (11 U.S.C. 107 (d) (2) and (e):

> "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is en-

gaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors."

"(e) For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

The Pre-Trial Order, under admitted facts, including the following:

"The defendant (appellant) then (February 20, 1963) had all the legal and equitable interests in all the corporate stock (of Dering Industries, Inc.) subject only to the foregoing option (of February 20, 1963)" (R. 34).

The case was tried by the appellee on the theory that the agreement of March 4, 1964, which followed the option of February 20, 1963, was in fact an option and that the appellee had assumed it under the provisions of 11 U.S.C. Sec. 110 (6) (b);

"(b) The trustee shall assume or reject an executory contract * * * within sixty days after the

> adjudication * * * but the court may for cause shown extend or reduce the time. Any such contract * * * not assumed or rejected within that time shall be deemed to be rejected. * * *"

and that he was entitled to the benefits of the option contract (R. 38) Pre-Trial Order P. 12 L. 18-27) (Tr. 34, 36, 37, 43, 49, 104). That performance thereof by the trustee was excused because appellant had repudiated the agreement (Tr. 47). Appellee also sought to amend his contentions in the Pre-Trial Order to allow this to be shown (Tr. 106).

The case was defended on the theory that the appellee had not assumed this executory contract within 60 days after bankruptcy as required by this statute, and if any rights had existed, in favor of the trustee, they had been lost (Tr. 36, 37).

After trial before the Hon. W. T. Beeks, without a jury, the Court rendered its Memorandum Opinion, holding that the appellee had failed to prove that he had assumed the executory option agreement between appellant and bankrupt dated March 4, 1964, but allowing recovery by appellee of one-half the price received by appellant for the corporate stock, less $10,600.00 and an allowance for services rendered (R. 49-52).

The appellee prepared Findings of Fact, Conclusions of Law based upon such Memorandum Decision (R. 53-58) to which appellant filed objections (R. 59-67).

Then the Hon. W. T. Beeks, Judge of the District Court, prepared "Findings of Fact and Conclusions of

Law Proposed by the Court" (R. 79-82) to which appellant filed objections (R. 83-86).

After a hearing upon such objections, Findings of Fact, Conclusions of Law and Judgment were entered herein in accordance with the Findings etc., proposed by the trial Court (R. 87-90).

SPECIFICATIONS OF ERROR

1. The District Court erred in finding:

> "4. The various transactions involving the delivery and transfer of sums from defendant to bankrupt and from bankrupt to defendant and the execution and delivery of the aforementioned options superseded each other and said option documents were intended to constitute security devices for loans made by the defendant to the bankrupt (R. 88 Findings etc.).

on the grounds and for the reasons:

a. That the evidence was insufficient to establish the purported fact;

b. That such finding was inconsistent with the theory upon which the appellee tried the case.

2. The District Court erred in refusing to give force or effect to the option of September 30, 1951, and appellant's exercise thereof, for the following reasons:

a. If the "options" executed in 1961-64 were security devices, then the original option of September 30, 1951 was in full force and effect; any rights of the bankrupt or appellee in or to the stock were subject to appellant's

right to purchase such stock, upon the bankruptcy or insolvency of bankrupt, at its book value with credit given appellant for the funds already paid bankrupt; appellant exercised that option right.

3. The District Court erred in finding that:

> "6. Within one year prior to the adjudication of bankruptcy on April 16, 1964, at a time when the bankrupt was insolvent, the bankrupt transferred to the defendant his equitable interest in the stock of the corporation. The only consideration for the transfer was the cancellation of the bankrupt's indebtedness and accrued interest." (R. 88)

and

> "8. The transfer and surrender of the bankrupt's equitable interest in the 100 shares of corporation stock, which had a fair market value of $25,120.00 in consideration of the cancellation of the bankrupt's indebtedness and accrued interest thereon, aggregating $10,600.00 was without fair consideration." (R. 89)

on the following grounds:

a. There was no evidence to support such findings;

b. Such findings are inconsistent with the finding that the transactions between the parties were security devices.

SUMMARY OF ARGUMENT

The rights and liabilities of the parties growing out of subsequent transactions, are affected by the option given by the bankrupt to appellant, at the time Dering

Industries, Inc. was organized, by which bankrupt agreed to sell appellant any stock bankrupt owned, at book value, in the event bankrupt became "insolvent or bankrupt".

If subsequent transactions were treated as sales with options to repurchase, the original option had no effect because bankrupt owned no stock, at the time of bankruptcy, upon which the option could operate.

If subsequent transactions were treated as security devices, then, when bankrupt was adjudicated as such, appellant had the right to buy any interest bankrupt had in any such stock, at book value, with credit for money advanced. Appellant gave notice of the exercise of this option.

Appellee elected to treat the transactions as options. The District Court held appellee failed to prove that he had assumed the last executory option contract, and that appellee could not recover on that theory.

Although the evidence does not support the finding, the District Court found the options to be security devices but failed to give effect to the original option.

Although there were no contentions or evidence that any such transaction had occurred, the District Court also held that there had been a transaction within one year of bankruptcy, in which bankrupt had surrendered his equity in such stock, in cancellation of indebtedness.

Having held that such a voidable transaction had occurred, the District Court did not set it aside, which would have reinstated the previous option, but entered

judgment in favor of appellee, to the same effect as if appellee had proven he had assumed the last option contract.

ARGUMENT

I

The District Court erred in finding:

> **"4. The various transactions involving the delivery and transfer of sums from defendant to bankrupt and from bankrupt to defendant and the execution and delivery of the aforementioned options superseded each other and said option documents were intended to constitute security devices for loans made by the defendant to the bankrupt." (R 88 Findings etc.)**

on the grounds and for the reasons:

a. The evidence was insufficient to establish the purported fact;

b. Such finding was inconsistent with the theory upon which the appellee tried the case.

There is no conclusive test of universal application to determine whether or not a transaction is a security device. *Blue River Sawmills et al* v. *Gates* (1961) 225 Or. 439, 461, 358 P.2d 239.

Some of the factors to be considered in determining whether a transaction is a sale with an option back or a security device, are:

a. A disputable presumption exists that an unconditional transfer is what it purports to be, and evidences the intention of the parties. In the absence of "clear, convincing and consistent proof to the contrary" such presumption prevails.

b. The primary inquiry is the discovery, if possible, of the mutual intention of the parties at the time the transaction was consummated. Subsequent acts and admissions, while material and relevant, are evidence of the pre-existing intent.

c. Negotiations had between the parties prior to the consummation of the transaction are the most promising point of inquiry. Negotiations originating out of an application for a loan tend to support the conclusion that the transaction was intended as a mortgage; the converse is equally true, when the negotiations begin with an offer of sale, it tends to support the conclusions that the transaction is not a security device.

d. Business, social or other relationships of the parties are circumstances relevant to the main issue of intention.

e. The fact that the transfer and an option to repurchase were written and dated the same day is a circumstance to be considered, but standing alone, proof of an option to repurchase does not furnish conclusive, nor necessarily persuasive proof that the transaction was a loan and not a sale.

f. Ordinarily the test to determine whether a transfer coupled with an agreement by the transferee to reconvey the property is a mortgage is whether there is an unsatisfied indebtedness owing the grantee which is enforceable independent of the transfer. The absence of a personal debt "raises such a strong natural inference in this sort of case that the transaction was a sale that it practically establishes the point".

g. If there is an agreement to reconvey and the optionor cannot compel repayment, the agreement may be regarded as a conditional sale.

h. A need for funds, in and of itself, does not indicate unsatisfied and demanding creditors.

i. Inadequacy of the price received is to be considered.

j. Requirement that interest be paid is a factor to be considered.

Blue River Sawmills et al v. Gates (1961) 225 Or. 439, 358 P.2d 239.

Kohler v. Gilbert (1959) 216 Or. 483, 339 P.2d 1102.

Colahan v. Smyth (1938) 159 Or. 569, 81 P.2d 112.

Testing the evidence in the instant case against the above factors:

The only testimony of the intention of the parties at the time, was the evidence of appellant that the transaction was intended to be a sale, with an option to repurchase (Tr. 9, 20); the bankrupt was not called as a witness; there was no explanation of this failure except that he presumably was in Phoenix, Arizona (Tr. 5). A failure to call a witness, or take his deposition, when that witness must have been acquainted with the facts "is significant" *Blue River Sawmills et al* v. *Gates supra,* p. 547.

Subsequent acts or admissions of the parties include minutes of the corporation, dated September 23, 1963,

signed by the bankrupt in which it is recited that appellant owned all the stock in Dering Industries, Inc. (Ex. 41).

In his statement of affairs, filed with his petition in bankruptcy, the bankrupt stated:

"11 Transfer of Property.

2. What property have you transferred or disposed of, other than in the ordinary course of business during the year immediately preceding the filing of the original petition herein? Released option to purchase stock in Dering Industries, Inc. to brother, Alonzo Dering on 3/4/64." (Ex. 1)

There was no evidence of previous negotiations. The bankrupt and the appellant are brothers.

There was no evidence of any debt owed appellant by bankrupt, payment of which appellant could have enforced. Appellant was not listed as a creditor of bankrupt in the schedules filed in bankruptcy (Ex. 1).

The appellant knew bankrupt wanted money, but did not know the reason (Tr. 15).

The price paid for the stock, $100.00 per share, was not inadequate. The book value of the physical assets did not exceed this valuation by any large percentage (Ex. 33, 34, 35, Tr. 26). The franchise or license was of uncertain or indefinite value. It was not carried on the books as an asset. It could not have been transferred without the licensor's consent. At the time the last option contract was signed (March 4, 1964) there was a distinct possibility that the franchise might be lost without any

compensation. Appellant testified that if he was unable to sell the stock, he was going to liquidate the business (Tr. 27, 73, 81). After the executory contract for sale of the capital stock to Life-Time Gate was made, there was a possibility that the purchaser might not perform its contract, leaving appellant with an action for damages for breach of contract.

The options required the payment of interest upon the price fixed therein, from date thereof to exercise of the option.

MEMORANDUM DECISION OF TRIAL COURT

In its Memorandum Decision, (Appendix A) the District Court held that the controlling factors were:

1. Interest.
2. The stock was never transferred to the defendant on the corporation's books.
3. The continuance of the bankrupt's share of the profits, unaltered by the "sale" of his stock to the defendant.

With all due respect to the District Court, the grounds for its decision, except as to interest, were contrary to the admitted facts of the case.

The Pre-Trial Order includes the following under Admitted Facts:

> "The certificate for 100 shares of stock originally issued to the bankrupt was surrendered and cancelled on the corporate books (on February 20,

> 1963) and a new certificate therefor was issued to the defendant." (R. 34 Pre-Trial Order P. 8, L. 11-14.)

and the undisputed evidence was that at the yearly corporate meeting after the February 20, 1963 transaction, the compensation of the bankrupt, to be received by him from Dering Industries, Inc. was reduced from $3,000.00 per year to $600.00 per year (Tr. 77). While the appellant called payments to bankrupt for previous years, a method of distributing profits from the corporation (Tr. 20, 21, 53), any such plan was ended when the corporate stock formerly owned by bankrupt was issued in the name of appellant, more than one year before bankruptcy (Tr. 22). This change did not result from any agreement between the defendant and appellant, but was unilateral action of appellant as the sole stockholder of the corporation (Tr. 22-23).

It is respectfully submitted that the preponderance of the evidence does not establish that the transactions were security devices; considering that the appellee had the burden of establishing the facts by "clear, convincing and consistent proof", it must be held that such proof is lacking. Appellant believes appellee recognized that fact before trial and therefore treated the transactions as options and endeavored to prove assumption thereof and performance or excuses for non-performance.

ARGUMENT

II

The District Court erred when it:

> **"Refused to give force or effect to the option of September 30, 1951, and appellant's exercise thereof"**

for the following reasons:

If the "Options" executed in 1961-64 were security devices, then the original option of September 30, 1951 was in full force and effect; any rights of the bankrupt or appellee in or to the stock were subject to appellant's right to purchase such stock, upon the bankruptcy or insolvency of bankrupt, at its book value with credit given appellant for the funds already paid bankrupt; appellant exercised that option right.

The situation confronting the appellee prior to commencement of this action, was.

1. If the transactions between the bankrupt and appellant during 1961-64 were to be considered as options, the original option of September 30, 1951 would no longer be in effect, since the bankrupt owned no stock upon which it could operate. If the appellee could establish that he had assumed the option contract of March 4, 1964, and that he had performed thereunder, or been excused from performance, appellee could recover under the option.

2. If the transactions between the bankrupt and appellant during 1961-64 were to be considered as security devices, with the bankrupt owning the equitable interest in 100 shares of Dering Industries, Inc. capital stock,

subject to a pledge in the amount of $10,600.00, such equitable interest of the bankrupt would be subject to the option of September 30, 1951, and appellant had the right to purchase such stock for its book value, and would be entitled to credit upon that purchase price for the amount of the claimed loan plus interest. The appellant had given notice of his intention to exercise the option of September 30, 1951.

Confronted with this situation, the trustee elected to treat the options as being what they purported to be, and endeavored to prove the trustee's acceptance and performance, or excuse for non-performance, of the terms of the last option—that of March 4, 1964. This he failed to do.

On its own initiative, the District Court found such transactions to be security devices. Appellant has assigned such finding as error, but, having made such finding, the District Court committed additional error by not giving effect to the option of September 30, 1951, which would have limited the recovery of the appellee herein to the difference between the book value of the stock and the claimed loan plus interest.

The execution and consideration for this original option of September 30, 1951 is admitted (R. 28-30, Par. III Pre-Trial Order) and its continued existence was not challenged except for a contention of appellee (in line with the theory that these transactions were options and not security devices) that:

> "3. The agreement of March 4, 1964, relative to the sale or liquidation of Dering Industries, Inc.

must be construed as superseding any and all prior agreements, options, understandings and arrangements between the defendant and the bankrupt, the parties thereto." (R. 38)

which was not sustained.

By failing to give effect to this original option, the District Court increased the effect of its original error in holding the transactions to be security devices.

ARGUMENT

III

The District Court erred in finding that:

> **"6. Within one year prior to the adjudication of bankruptcy on April 16, 1964, at a time when the bankrupt was insolvent, the bankrupt transferred to the defendant his equitable interest in the stock of the corporation. The only consideration for the transfer was the cancellation of the bankrupt's indebtedness and accrued interest."**
>
> **"8. The transfer and surrender of the bankrupt's equitable interest in the 100 shares of corporation stock, which had a fair market value of $25,120.00 in consideration of the cancellation of the bankrupt's indebtedness and accrued interest thereon, aggregating $10,600.00 was without fair consideration."**

on the following grounds:

a. There was no evidence to support such findings;

b. Such findings are inconsistent with the finding that the transactions between the parties were security devices.

The District Court, in its Memorandum Decision (Appendix 25) stated that appellee had advanced three theories of recovery:

1. Express assumption by the appellee of the option contract of March 4, 1964;

2. Transfer by the bankrupt with actual intent to defraud his creditors;

3. Transfer by bankrupt without fair consideration within one year of bankruptcy while insolvent (constructive fraud) (R. 49, Appendix 25).

The contentions of the appellee do not include a contention that there was any transfer by the bankrupt in actual or constructive fraud of his creditors. The only contentions in the Pre-Trial Order on the question of fraud are as follows:

"* * * *If the transaction culminating in said agreement (of March 4, 1964) be construed as an agreement* requiring the bankrupt to make an actual payment * * * then, in view of the circumstances existing and of which the defendant had knowledge, such transactions constituted a transfer made or incurred without fair consideration by the bankrupt who was then insolvent * * *" (R. 39, L. 2-10) (emphasis added) and

"* * * If the transaction culminating in said agreement (of March 4, 1964) *be construed as an agreement* requiring the bankrupt to make an actual payment * * * such transaction constituted a transfer made or incurred with intent to hinder, delay or defraud creditors and was fraudulent * * *." (R. 39, L. 19-28) (Emphasis added).

These contentions made by the appellee were in line with his theory that the agreement of March 4, 1964,

was in fact an option and any rights of appellee against the appellant rested upon enforcement of the agreement of March 4, 1964.

Since the District Court held that the appellee had not assumed the option contract of March 4, 1964, the contentions as to its construction contained in the Pre-Trial Order become immaterial.

Not only were there no contentions by appellee that a transaction occurred within one year of bankruptcy, by which the bankrupt transferred his equitable interest in the corporate stock to appellant in return for cancellation of indebtedness, there was no evidence of any such transfer.

The only transaction between the appellant and bankrupt within one year of bankruptcy was the transaction of March 4, 1964 which the District Court found to be a security device.

The finding of the District Court that such a voidable transfer occurred within one year of bankruptcy loses any weight it might otherwise have, because the District Court, in its Memorandum Decision, says:

> "*Although the Court is unable to fix the precise date* the Court does find * * *" (R. 51, Appendix 27) (emphasis added).

If the District Court had regarded the transaction of March 4, 1964 as being a transfer in fraud of creditors, there would have been no uncertainty as to date. There simply was no evidence of any other transaction between the parties within one year of bankruptcy, and the finding of the Court is unsupported by any evidence.

CONCLUSION

The inevitable conclusion to be drawn from the record in this case, is that facts and logic were disregarded by the District Court and that the judgment in favor of the appellee must be reversed.

Respectfully submitted,

C. X. BOLLENBACK
Attorney for Appellant
Alonzo W. Dering

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rule 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

C. X. BOLLENBACK

APPENDIX A

MEMORANDUM DECISION

The trustee has sought to recover a share of the proceeds of the sale of Dering Industries, Inc. to Moncrief-Lenoir. Three theories of recovery have been advanced: (1) express assumption by the trustee of the option contract of March 4, 1964, 11 U.S.C. §110(b); (2) a transfer by the bankrupt with actual intent to hinder, delay or defraud creditors, 11 U.S.C. § 107(d)(2)(d); and (3) a transfer by the bankrupt without fair consideration within one year prior to bankruptcy and while insolvent, 11 U.S.C. § 107(d)(2)(a).

After weighing the evidence and studying the exhibits, the court has concluded that the trustee has failed to sustain the burden of proof as to assumption of the option agreement of March 4, 1964. The only evidence introduced by the trustee was that notice was given that a claim was being made to the proceeds of the sale, but a mere claim to the proceeds does not give fair or adequate notice of assumption of the contract since such a claim is also fully consistent with other theories of right to the proceeds, such as fraudulent transfer, unlawful preference or equitable ownership. Even allowing the requested amendment to plaintiff's pretrial order contentions to conform to the proof, the court is not prepared to find that notice of assumption was waived by the defendant by the mere statement of his position that the bankrupt had no right to the proceeds because he had not exercised the purchase option by May 31, 1964.

The court is also of the opinion that the trustee has failed to carry his burden of proof as to the claim that the bankrupt's interest in the 100 shares of stock was transferred with an actual intent to hinder, delay or defraud creditors. However, the court does find that the trustee has succeeded in proving a transfer without fair consideration within one year prior to bankruptcy and while the bankrupt was insolvent.

The entire pattern of this series of "sales" and "options to repurchase" strongly indicates that the transactions were in fact merely security devices for loans made to the bankrupt. The "options" provided for the payment of interest and on at least one occasion, December 6, 1962, adjustment was made to allow for interest. On that occasion the bankrupt "exercised" the "option" and "repurchased" 22 shares, but paid a price which under the option agreement was equivalent to the price for 30 shares. The defendant, with commendable candor, testified that the disparity was to allow for interest paid him by the bankrupt. Had the options provided only for a fixed purchase price a closer question would be presented, but interest by definition is the price per unit time paid by the borrower on what he borrows. Furthermore, the stock was never transferred to the defendant on the corporation's books. In addition, the bankrupt continued to receive a salary for his services on the same terms as before the purported sale of his stock. This salary was based on the profits of the corporation and inasmuch as no dividends were ever declared, the salary appears to have been primarily a device for the distribution of corporate profits. The continuance of the bank-

rupt's share of the profits, unaltered by the "sale" of his stock to the defendant, is further indication of his retention of an equitable interest in the stock. Adopting the theory most favorable to the defendant, the court can at best find the transaction to be a security device.

Although the court is unable to fix the precise date, the court does find that within one year prior to the adjudication of bankruptcy on April 16, 1964, and at a time when the bankrupt was already insolvent, the bankrupt transferred to the defendant his equitable interest in the 100 shares of Dering Industries stock. The only consideration for the transfer was the cancellation of the debt and accrued interest.

The parties have agreed that the defendant realized $50,240 from the sale of Dering Industries, Inc. and the court finds this to be the fair market value at the time of the transfer of the bankrupt's equitable interest. The trustee is entitled to one-half of that amount minus $10,600, the agreed amount of the debt and accrued interest, or $14,520. The court further finds that the defendant is entitled to a credit of $400 for the value of his services rendered in winding up the affairs of the corporation.

Judgment will be entered in favor of the plaintiff trustee for $14,120.

Plaintiff's counsel will prepare findings, conclusions and judgment to be submitted to this Court not later than July 19, 1965. Defendant's counsel shall have five days thereafter to note any objections.

DATED this 8th day of July, 1965.

APPENDIX B

Appellee-Plaintiff's Exhibits

Exhibit No	Identified	Offered	Received	Rejected
1	102	102	102	
2	33	33		35
3	35	35-6		38
4	50	50	50	

Appellant-Defendant's Exhibits

16	11	11-12	
17	24-25		
20 (a)(b)(c)	16, 56	57	57
21	56	57	57
22	57-58	58	58
24	61	61	62
25	61	61	62
27	62	62	63
28	62	62	63
29	27, 63	68	
30	68	68	68
31	68	68	68
32	68	68	68
33	70	70	70
34	70	70	70
35	70	70	70
36	75		77
37	68-69	69	69
39	68-69	69	69
40	68-69	69	69
41	24, 70	71	71
42	24, 70	71	71